

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-13555 (JMP)

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5 In the Matter of:

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7 LEHMAN BROTHERS HOLDINGS, INC., et al.,

8

9 Debtors.

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11

12 United States Bankruptcy Court

13 One Bowling Green

14 New York, New York

15

16 February 28, 2013

17 10:06 a.m.

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19 B E F O R E :

20 HON JAMES M. PECK

21 U.S. BANKRUPTCY JUDGE

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1 One Hundred Ninety-Eighth Omnibus Objection to Claims (Late-  
2 Filed Claims) [ECF No. 19902]

3  
4 Three Hundred Eighty-Eighth Omnibus Objection to Claims (No  
5 Liability Claims) [ECF No. 34042]

6  
7 Motion of Traxis Fund, LP and Traxis Emerging Market  
8 Opportunities Fund, LP to Compel Debtors to Reissue  
9 Distribution Checks for Allowed Claims [ECF No. 32163]

10  
11 Debtors' Fortieth Omnibus Objection to Claims (Late-Filed  
12 Claims) [ECF No. 11305]

13  
14 Debtors' Ninety-Seventh Omnibus Objection to Claims  
15 (Insufficient Documentation) [ECF No. 14492]

16  
17 Debtors' One Hundred Twenty-Fifth Omnibus Objection to  
18 Claims (Insufficient Documentation) [ECF No. 16079]

19  
20 Debtors' One Hundred Thirty-Eighth Omnibus Objection to  
21 Claims (No Liability Derivatives Claims) [ECF No. 16865]

22  
23 Debtors' One Hundred Eighty-Second Omnibus Objection to  
24 Claims (Valued Derivative Claims) [ECF No. 19398]

25

1 Debtors' One Hundred Ninety-Eighth Omnibus Objection to  
2 Claims [ECF No. 19902]

3  
4 Three Hundred Sixtieth Omnibus Objection to Claims (Valued  
5 Derivative Claims) [ECF No. 31316]

6  
7 Three Hundred Seventy-Eighth Omnibus Objection to Claims (No  
8 Liability Claims) [ECF No. 32651]

9  
10 Three Hundred Eighty-Third Omnibus Objection to Claims (No  
11 Liability Claims) [ECF No. 32890]

12  
13 Three Hundred Eighty-Ninth Omnibus Objection to Claims  
14 (Reduce and Allow Claims) [ECF No. 34043]

15  
16 Debtors' Three Hundred Ninetieth Omnibus Objection to Claims  
17 (Valued Derivative Claims) [ECF No. 34044]

18  
19 Plan Administrators' Omnibus Objection to Claims Filed by  
20 Deborah E. Focht [ECF No. 34303]

21  
22 Claims Objection Hearing with Respect to Objection to Proofs  
23 of Claim Nos. 29721 and 29748 [ECF No. 33647]

24  
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1 Debtors' Objection to Proof of Claim No. 66099 Filed by  
2 Syncora Guarantee, Inc. [ECF No. 20087]

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Transcribed by: Sherri L. Breach

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22 BY: JOHN R. ASHMEAD, ESQ.

23 JUSTIN SHEARER, ESQ.

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1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 Good morning.

4 MR. HORWITZ: Good morning, Your Honor. Maurice  
5 Horwitz, Weil, Gotshal & Manges on behalf of Lehman Brothers  
6 Holdings, Inc. as plan administrator.

7 We have two uncontested items to begin with on  
8 today's agenda. The first is the debtors' one-hundred-and-  
9 ninety-eighth omnibus objection to claims. This objection  
10 sought to disallow certain claims that were filed after the  
11 bar date for claims -- for filing claims in these cases.

12 The objection -- there was a response filed to  
13 this objection by a claimant, Carol Bunevich, whose claim  
14 was filed on July 29th, 2011. Ms. Bunevich has decided not  
15 to prosecute her response. I don't see her counsel in the  
16 courtroom today. I don't know if he has dialed in by  
17 telephone, but he advised me he did not expect to appear  
18 today.

19 So the plan administrator requests that the Court  
20 enter a supplemental order, which we will submit, expunging  
21 this claim on an uncontested basis.

22 THE COURT: It's expunged on an uncontested basis.

23 MR. HORWITZ: Thank you.

24 The next item is the three-hundred-and-eighty-  
25 eighth omnibus objection to claims. There was one response

1 filed to this objection. The objection has been adjourned  
2 with respect to that one response; that's the response of  
3 Jeremy Davis, ECF 34783. His claim is Claim Number 4362.  
4 We filed a notice of adjournment on February 22nd at ECF No.  
5 35253. I apologize that this notice of adjournment did not  
6 appear on the adjourn section of the agenda. It was our  
7 oversight. But the objection has been adjourned with  
8 respect to that claimant and they were notified.

9 The other claimants on the objection did not  
10 respond or did not object -- respond to the objection.  
11 However, the order -- one claimant requested that the order  
12 be modified with respect to one of the claims. This  
13 modification doesn't affect any of the other claims. The  
14 last -- the second to last ordered paragraph of the order  
15 provides that no portion of any of the claims subject to the  
16 objection are affected if they were -- if the objection  
17 indicated that those -- that that portion was not subject to  
18 the objection. There is a -- each -- each of the claims --

19 THE COURT: Do you know what you just said because  
20 I don't?

21 MR. HORWITZ: Let me rephrase.

22 THE COURT: Okay.

23 MR. HORWITZ: Certain portions of the claims that  
24 were subject to this Omni 388 were not subject to the  
25 objection. They were excluded from the objection.

1 THE COURT: Okay.

2 MR. HORWITZ: One of the claimant's requested that  
3 the order clarify for the avoidance of doubt that with  
4 respect to Claim Number 33633 that portion that is not  
5 affected is the portion that is now owned by -- and I'm not  
6 sure I'm pronouncing this correctly, but Callanish (sic)  
7 Capital, LLC, Queensferry M, LLC and Credit Suisse Loan  
8 Funding, LLC.

9 So that clarification has been added to the order.  
10 It doesn't affect any of the other claims that are subject  
11 to the objection.

12 THE COURT: So long as counsel is satisfied with  
13 the clarification and you have no objection, I'll be fine  
14 with it.

15 MR. HORWITZ: Okay. We will submit an order.

16 THE COURT: Okay.

17 MR. HORWITZ: So now we will move to the contested  
18 portion of the agenda, the motion of Traxis Fund, LP and  
19 Traxis Emerging Market Opportunities Fund, LP to compel the  
20 debtors to reissue distribution checks for allowed claims,  
21 and I will turn the podium over to counsel for Traxis for  
22 that.

23 THE COURT: Fine.

24 (Pause)

25 MR. ASHMEAD: Good morning, Your Honor. John



1 Ashmead of Seward & Kissel for Traxis.

2 Your Honor, I got home last night and my wife told  
3 me my fourteen-year-old had a bacterial infection and all I  
4 was thinking of is I hope I don't get sick tonight because  
5 this hearing, as we -- this would be the third time and I  
6 don't know what would happen. The first time it was  
7 incorrectly listed as a status conference; the second time  
8 the Court had a electrical fire and Mr. Feld (ph) assured me  
9 had nothing to do with that; and I said now all I need to be  
10 is sick and then we don't go forward. So --

11 THE COURT: So how are you feeling today?

12 MR. ASHMEAD: I'm -- I'm feeling just fine.

13 THE COURT: Good.

14 MR. ASHMEAD: So we're --

15 THE COURT: And how is your daughter feeling?

16 MR. ASHMEAD: My -- my son, he's -- he's fine. A  
17 little bronchitis, we think --

18 THE COURT: Okay.

19 MR. ASHMEAD: -- but he's alright.

20 So, Your Honor, in short form, this matter can be  
21 described as -- as follows:

22 Traxis -- the Traxis Funds are original Lehman  
23 creditors who had allowed claims. They were legitimate  
24 distributees under the plan. In October, Epiq, the plan  
25 administrator's claim agent and distribution agent reached

1 out directly to Traxis to basically say they had received  
2 some checks back as un -- undeliverable. And during the  
3 course of those conversations -- this was a second set of  
4 distributions. It became clear that this was a second set  
5 of distributions and that the first set had not been  
6 received by Traxis.

7 So Traxis, they had some conversation -- I think a  
8 few back and forth with Epiq on a business to business basis  
9 and said, can you please re-cut them. Ultimately, Epiq said  
10 no, no, we can't. There's a plan provision about unclaimed  
11 distributions, and ten or eleven days ago that deadline  
12 where you would have had to come to us expired so we can't  
13 do anything about that.

14 My firm got involved. We had some discussions  
15 with the plan administrator's counsel. We then had some  
16 discussions with the creditors' committee who then had some  
17 discussions with the plan administrator's counsel. And the  
18 long and the short of that is we ended up filing the motion  
19 when it looked like that would -- would not go anywhere.

20 The high level concerns here are basically whether  
21 or not the plan's unclaimed distribution provision applies  
22 in this circumstance. Related to that, of course, is  
23 whether Traxis received the checks or should be deemed to  
24 have received those initial distribution checks. And then  
25 related to that, if -- I guess if the provision applies to

1 these facts, whether or not withstanding that, Traxis should  
2 be given some relief and -- from the provision and be able  
3 to get its -- its distribution checks.

4 The parties have set out there arguments and  
5 they've submitted affidavits of their positions and those  
6 are before the Court.

7 So I would start with the plan provision, Section  
8 8.9 of the plan, and it's called Time Bar to Cash Payment  
9 Rights. That provision reads: "Checks issued in respect of  
10 allowed claims shall be null and void if not negotiated  
11 within 90 days after the date of issuance thereof."

12 So the first part talks about checks being issued  
13 and then if they're not negotiated within 90 days, they're  
14 -- they're void. It's sort of you go and you buy your new  
15 home printer and you fill out the rebate form at Staples and  
16 they'll send you a check, hopefully, in a few months. And  
17 it usually has a deadline and it's sort of, if you don't  
18 cash it by then, you put it in a drawer, you're -- you're  
19 done.

20 It then says that, "Request for reissuance of any  
21 check shall be made to the plan administrator to who such  
22 check was originally issued." So the person that was issued  
23 the check has to make the request. And then it continues,  
24 "Any claim in respect of that voided check must be made on  
25 or before 90 days after expiration of the initial 90 days

1 after the check was issued. Thereafter, it irrevocably  
2 reverts to the debtors."

3 So, again, the check speaks -- the provision  
4 speaks to checks being issued and negotiated, and then if  
5 you don't do that, you're out. So if you get the check and  
6 you sit on it, you put it in a drawer, you lose it behind  
7 your desk, put it in a stack of papers and you discover it  
8 too late, it's your -- clearly your problem.

9 But in our view, if -- if -- if you don't have the  
10 check, you can't negotiate it. And in our view you  
11 shouldn't be held to a timeline, and we don't think that's  
12 how this provision should work if you haven't gotten the  
13 check because you then don't even know when the timeline  
14 started.

15 And our view would be if the -- if the intention  
16 of the provision is that even if you don't get the check, as  
17 long as Epiq cut the check, the clock begins to run, we  
18 think it should just say that; that it's going to run from  
19 the moment we cut a check, whether or not you get it. It  
20 does not say that. It doesn't say that if your check is  
21 sent you've got 90 days to negotiate it, whether or not you  
22 get it, and no notices were sent to creditors saying, we  
23 just sent you a check.

24 You know, if the provision applies more broadly  
25 than we think the way it's being interpreted here by the

1 plan administrator, we think it's ambiguous, at best, and  
2 should be construed against the drafter, not against Traxis.  
3 As a matter of practices, Your Honor I'm sure knows these  
4 types of provisions are sort of boiler plate parts of plans.  
5 They're important parts of plans so that you can have  
6 finality.

7 THE COURT: I'm sure it's part of the plan that  
8 nobody spent a lot of time negotiating.

9 MR. ASHMEAD: Yeah.

10 THE COURT: It's just there.

11 MR. ASHMEAD: That's -- that's right. I've been  
12 doing this 22 years and I've seen it a million times, been  
13 in plans I've drafted or commented on. It's not something  
14 -- and I think the creditors' committee's reaction and their  
15 support of us here is -- sort of speaks to that. And that's  
16 not a criticism of anyone. That's just one of those many  
17 pages of boiler plate --

18 THE COURT: Let me just inquire --

19 MR. ASHMEAD: -- in the plan.

20 THE COURT: -- because I understand that Mr. Dunne  
21 is participating by telephone. I want to confirm that he's  
22 on the phone.

23 MR. O'DONNELL: Your Honor, it's actually Mr.  
24 O'Donnell and I am on the phone.

25 THE COURT: Oh, okay. The wrong Dennis. And are

1 you the one who is in Reno?

2 MR. O'DONNELL: I am actually in Las Vegas, Your  
3 Honor. I have a first day hearing on another matter. But I  
4 have Ms. Mandel -- Lena Mandel who is in the courtroom --

5 THE COURT: I see her.

6 MR. O'DONNELL: -- and she will be addressing the  
7 motion.

8 THE COURT: All right. Fine.

9 Okay. Please proceed.

10 MR. ASHMEAD: Okay. So I think there is some law  
11 on the -- surrounding the area of unclaimed distributions,  
12 and that law -- the case law on these types of provisions  
13 are pretty consistent and basically saying, these provisions  
14 are intended to allow for finality, for closure. They're  
15 not to restrict claim holders of their otherwise rightful  
16 distributions, and those cases make fairly clear that  
17 there's a strong bias that every effort be made to get a  
18 distribution to a holder's hands before -- or that the  
19 holder make clear they have no interest in it or they've  
20 abandoned it before the distributions are taken away.

21 So, one, the creditor has to demonstrate a clear  
22 intention to abandon; and, two, the distribution agent or  
23 estate administrator has to have taken, you know, reasonable  
24 -- at least reasonable steps to try to ensure that's the  
25 case.

1           Here, Traxis made crystal clear it does not want  
2   to abandon its distribution. It acted with great speed the  
3   moment it learned that there were prior distributions to --  
4   to request that they be distributed. Four to five months  
5   before the first distribution they, as requested, as with  
6   other claimants, had sent in tax forms and certifications  
7   which had to be received so that they could receive the  
8   distributions under the plan.

9           Here, the plan administrator nor its agent took  
10   any steps to notify Traxis that four separate checks and  
11   four separate mailings had not been cashed, only contacted  
12   them after the second set had been returned as undeliverable  
13   and, again, which was just, I think, eleven days after the  
14   --

15           THE COURT: Are you suggesting --

16           MR. ASHMEAD: -- expiration date.

17           THE COURT: Are you suggesting in that last  
18   comment that there is a duty imposed on the plan  
19   administrator to reach out and provide notice, or are you  
20   just saying that that's a factor --

21           MR. ASHMEAD: I --

22           THE COURT: -- in the case?

23           MR. ASHMEAD: I think it's a factor, but I think  
24   if you read the case law on unclaimed distribution  
25   provisions, it says, one, there's got to be a clear

1 intention to abandon by the claimant, and the Courts may  
2 arrive at different conclusions on that, depending on what  
3 the facts are; and, two, the distribution agent or estate or  
4 debtor must take, you know, reasonable efforts to ensure  
5 that that's, in fact, the case. And, here, you know,  
6 there's nothing in the Bankruptcy Code which says -- or the  
7 rules which says you have to take X, Y, Z steps. It's sort  
8 of a gloss from the case law.

9 Our view is if Traxis did not receive the checks,  
10 and we'll get into that and those facts and details --

11 THE COURT: Can we --

12 MR. ASHMEAD: -- in a moment --

13 THE COURT: Can we talk a little bit about that  
14 because I -- I've looked at the various declarations in  
15 connection with this, and is it a fair conclusion that  
16 nobody really knows what happens -- what happened to these  
17 checks; that they're just missing in action?

18 MR. ASHMEAD: I think our client has -- does not  
19 believe it ever received the checks because --

20 THE COURT: But that's --

21 MR. ASHMEAD: -- it has very specific --

22 THE COURT: But we don't know that. It's  
23 impossible to know that.

24 MR. ASHMEAD: I guess it's -- yes. As -- as an  
25 absolute, I guess it's impossible to know that, but they



1 have very specific procedures for how they handle mail,  
2 including if someone no longer works there who it goes to,  
3 how it gets dealt with. And here we have an addition to  
4 that. We know that a second set was returned as  
5 undeliverable.

6 We also know that when they went to reissue the  
7 second set after speaking to my client to the correct  
8 address, that they -- that there were -- I don't -- that  
9 they tried that two or three times and the checks didn't get  
10 there. So there was a consistent pattern of problems. And  
11 the address is not like a house boat or something. It's a  
12 real location in Connecticut.

13 So I guess as an absolute, yes. We -- we don't  
14 know. We know we have specific detailed mail handling and  
15 sorting procedures. They were followed. They have always  
16 been filed. They've had no problems getting other mail, and  
17 to their understanding they deny receipt because if it  
18 followed this process, they would have gotten it. And it's  
19 not one piece of mail.

20 THE COURT: It's four.

21 MR. ASHMEAD: It's four separate pieces of mail.  
22 I think that's not likely. I hearken back to my comment on  
23 the home printer from Staples because that happened to me.  
24 I got that \$90 rebate at the store --

25 THE COURT: Did you lose it?

1 MR. ASHMEAD: -- and I filled it in, got the  
2 check, put it in a -- on my home desk and found it, you  
3 know, six months later in the corner and it said it expired  
4 90 days.

5 THE COURT: Have you brought a claim against  
6 Staples?

7 MR. ASHMEAD: No.

8 (Laughter)

9 THE COURT: Okay.

10 MR. ASHMEAD: But -- but four, I think it's a  
11 little -- it's a little implausible.

12 So did Traxis receive the distribution checks?  
13 We've touched on this a bit, but we do have an affidavit of  
14 Adam Jaffie that makes clear that from Traxis' perspective  
15 it did not receive four separate pieces of mail with four  
16 separate checks containing initial distribution checks. The  
17 affidavit details their receipt handling and sorting  
18 procedures. Again, if someone no longer works there or it's  
19 not addressed to someone, there's a specific process from  
20 the office manager to Mr. Jaffie. Nothing can be thrown  
21 away without him opening it and seeing it. That's their  
22 process.

23 There was no certificate of service filed here by  
24 Epiq, no contemporaneous certificate of service maintained  
25 by them. Even if it wasn't filed, they filed something

1 eight months later by Mr. Baer (ph) with no indication that  
2 Mr. Baer was directly involved in the mailing of these four  
3 checks, although he's ultimately the supervisor, saying that  
4 they were sent.

5 There's no question that the second set of  
6 distribution checks were returned as undeliverable. And as  
7 noted, there were subsequent delivery problems on resending  
8 the second set of distribution checks for reasons that are  
9 unclear to anyone, but it's a fact there were problems  
10 getting them there to the correct address --

11 THE COURT: Do you have any --

12 MR. ASHMEAD: -- and ultimately had to be sent --

13 THE COURT: Do you have any --

14 MR. ASHMEAD: -- by Fed Ex.

15 THE COURT: Excuse me. Just -- just one  
16 additional question.

17 Do you have any indication that there was some  
18 problem with the forwarding order --

19 MR. ASHMEAD: None.

20 THE COURT: -- with the post office?

21 MR. ASHMEAD: They continue to get forwarding mail  
22 to this time, and like many other businesses and millions of  
23 individuals, rely on the U.S. Postal Service for their mail  
24 forwarding and have had no problems.

25 And as noted, they had problems receiving mailings

1 from Epiq, even at the new address once Epiq was given the  
2 new address. Now I can't explain that, but it's just  
3 something here in the ether in terms of it's not a question  
4 of what the address is.

5 So -- in Traxis' view, they never got them. It  
6 shouldn't be held to these clocks running. We think it is  
7 possible that Epiq got the first set back as undeliverable  
8 and maybe they lost them or maybe they never sent them. We  
9 -- we don't know. We know that Epiq is not infallible. I  
10 think when we were here five or six weeks ago, which just  
11 happened to be the day before that, the plan administrator  
12 filed a declaration of Jacqueline Marcus (ph), Docket 33892,  
13 with respect to the stay of avoidance actions where they  
14 indicated that due to an administrative error on Epiq's  
15 part, most of 339 defendants in certain adversary  
16 proceedings had not been served with a recent motion.  
17 People make mistakes. It happens.

18 We also know that according to the plan  
19 administrator's objection to our claim, that they note that  
20 288 other creditors hadn't cashed their checks. We don't  
21 know what the underlying facts of -- of -- of -- are to  
22 that. We don't know whether it's that they just sat on  
23 them, they received them or not, but there could be  
24 problems. We understand this is a big process. We  
25 understand there's millions of checks cut and lots of

1 creditors and it's four years after the case commenced.

2 People move, things happen. We understand that.

3 THE COURT: Well, let's think --

4 MR. ASHMEAD: But we exist. We --

5 THE COURT: -- let's -- let's think a little bit  
6 about what this is really intended to deal with.

7 Section 8.9 of the plan --

8 MR. ASHMEAD: Uh-huh.

9 THE COURT: -- as you note is designed for  
10 finality. There are 288 checks or pieces of mail that are  
11 in the same category as this one.

12 MR. ASHMEAD: Perhaps. We --

13 THE COURT: Perhaps.

14 MR. ASHMEAD: -- don't know the details.

15 THE COURT: We don't know.

16 MR. ASHMEAD: Yeah. Uh-huh.

17 THE COURT: But in the ordinary course of  
18 distributing checks to a huge universe of recipients,  
19 presumably some people die, some people go out of business,  
20 some people move and their forwarding address is not  
21 provided to the post office or the forwarding order expires.

22 MR. ASHMEAD: Uh-huh.

23 THE COURT: So there are multiple reasons -- and I  
24 probably haven't given you a complete list -- as to why  
25 there may be this universe of undeliverable checks.

1           The escheat or forfeiture aspects of this are  
2       common in plan and, frankly, desirable because the check has  
3       to go somewhere and, more importantly, what the check  
4       represents, which is a right to a distribution, needs to go  
5       somewhere. It either goes to the claimant or it's returned  
6       to the estate for the benefit of the estate and its other  
7       creditors.

8           So let's talk a little bit about this, not just in  
9       respect of the particulars that affect your client, but the  
10      case administration aspect of it, which I presume is the  
11      reason that we're having this fight.

12           I think that as a matter of pure equity, you're  
13      entitled to this check. You're entitled to the money. You  
14      should get the money. The creditors' committee has  
15      supported your position representing, I think, an important  
16      moral pull in your direction. And I'm sympathetic.

17           So with that having been said, what's your comment  
18      in respect of what I have to think is the reason that we're  
19      having this discussion in the first place in making a  
20      special exception for you, since we actually don't know what  
21      happened to the checks.

22           MR. ASHMEAD: Uh-huh. Your Honor, I -- I  
23      appreciate your concern. I appreciate your statements, and  
24      I -- I guess my reaction to that would be as follows.

25           One, I think every case has to be examined on its

1 facts, and I don't know what the facts are with the other  
2 288, and maybe they're not exact. We've not come in here  
3 and said, you shouldn't have an escheat section. We  
4 understand it. We understand they're important. We  
5 understand why they exist. The question is, what are the  
6 facts of this case which should take us outside that, and we  
7 think that doesn't do away with the whole provision. And I  
8 don't know what the story is with those other parties.

9 We also know that this is not, to just expand a  
10 little, a more typical case about a deadline which most  
11 typically comes up with bar dates in establishing the pool  
12 and negotiating a plan and knowing what you're doing. This  
13 is people -- these are claims that are allowed. The plan is  
14 set. You know it well. The distributions are being made.  
15 I think you have to look at the facts, I guess, is what I  
16 would say.

17 Also, have those parties moved? I don't know if  
18 they've moved. I don't know if you -- if Your Honor could  
19 sit here and say, you know that the moment we learned,  
20 eleven days after the deadline, we asked immediately. We  
21 then engaged counsel. We spoke to counsel. And when a week  
22 later we spoke to the committee and that didn't work, we  
23 filed our motion. We know what's important. While we think  
24 we shouldn't even have to get into a pioneer analysis, we  
25 know that's important to show that we are acting with due

1 speed because we don't want to delay these estates in the  
2 further distribution to anyone else or have this done.

3 I don't know what these other parties have done.  
4 I don't know. Are there 288 motions filed on this? Your  
5 Honor might very well three months later -- because I think  
6 we're three months later now -- view motions filed by these  
7 people. Well, why did you sit around for the last three  
8 months? You know, I think this even hit the press somewhere  
9 or the local trade press. People, you know, they've sat on  
10 their rights. And I don't know what their underlying facts  
11 are. I know what our underlying facts are here and I think  
12 they're compelling.

13 Let me -- following -- because I -- this is a very  
14 important, important point, and so I'll sort of jump off my  
15 outline to -- because it seems like Your Honor has cut  
16 through this, really.

17 You know, we are legitimate creditor, that's one.  
18 Again, there's no question about establishing a pool of  
19 claims or negotiating the plan. We acted with diligence and  
20 speed in trying to correct this and getting a motion on  
21 file. It's \$175,000. I mean, it's -- it's -- the client  
22 has spent a lot of money to try to get that \$175,000.

23 Deadline, the purportedly applicable deadline was  
24 just eleven days earlier. We've got an affidavit which  
25 details very clearly what our process is. It's not just we



1 didn't get this, or I think the dog ate it, or I have a bad  
2 mailman. Here's what our process is here. This is how it  
3 works. We didn't get it.

4 There's sort of other evidence, if you will, about  
5 problems with other distributions, including the second  
6 distribution which led to the call. This -- the size of the  
7 -- you know, the amounts in dispute here are small in  
8 relation to the whole case. Again, I don't know what the  
9 other 288 are.

10 You know, we think that if you had to look who  
11 should bear the burden here, we think that the plan  
12 administrator is certainly in a better position and would  
13 know whether checks were cashed or not. I would imagine  
14 they have some reporting and they generate a list, and they  
15 would have been in a position, if they wanted to contact us.  
16 After the second check they did. We've acted in good faith.  
17 We have the support of the committee.

18 We don't think the plan's provision is a bad  
19 provision. We think the question is, in the first instance,  
20 whether it's invoked here, if we didn't get the checks. And  
21 we think on balance the greater evidence and the greater  
22 inferences you can draw from everything that happened is  
23 that they were not received. And that's what Courts do when  
24 they're reviewing like mailbox rule cases. They sort of  
25 look at everything and on balance how does it look.

1 We know that the distribution agent is not  
2 infallible. That doesn't mean they're bad people. It means  
3 that there may have been a mistake here. They may have  
4 gotten the first back and then just didn't contact us.

5 So in the first instance we just don't think it  
6 applies because we think it only should apply if you've  
7 gotten the checks, and we didn't get the checks. But if it  
8 does, we think we should be given relief under the excusable  
9 neglect standard or otherwise from -- from the provision for  
10 all the reasons articulated.

11 Your Honor, I'm prepared to answer other  
12 questions, to go into other issues that have been raised,  
13 but you seem to have cut more to the heart of it. So I did  
14 as well.

15 THE COURT: That's fine. Thank you.

16 MR. ASHMEAD: Okay.

17 THE COURT: Yes. I'll hear from the committee and  
18 then I'll hear from the plan administrator.

19 MS. MANDEL: Thank you, Your Honor. Lena Mandel,  
20 Milbank, Tweed, Hadley & McCloy on behalf of the creditors'  
21 committee.

22 The committee, Your Honor, as -- as you know is  
23 supporting the relief that the claimant is seeking. We  
24 clearly cannot speak to the fact whether the checks have  
25 indeed been received or not, but assuming that they have

1       been received, our position is that this situation is not  
2       covered by the plan provision that we're discussing, Section  
3       8.9.

4               As Your Honor correctly points, this is a boiler  
5       plate provision that goes into every plan. However, the  
6       period of time up to which the property escheats varies from  
7       plan to plan, and 90 days is really on the short side. And  
8       the committee, as the case fiduciary who took part in  
9       negotiating the plan, agreed to this short period of time on  
10      the assumption that it would only apply to claimants who sat  
11      on their rights; who received the check and didn't do  
12      anything. And we thought it would be not unfair to  
13      penalize, if you will, those people for taking no action.  
14      However, to the extent the claimants never received the  
15      check, there was no conduct that should penalize.

16             And --

17             THE COURT: So is it your position -- and I know  
18      that there's some disputes as to whether the committee even  
19      has ongoing standing here, but let's just assume for a  
20      moment that you do. Is it your position that Section 8.9 of  
21      the plan should be interpreted, even though the words aren't  
22      within it, as applying to only claimants who have sat on  
23      their rights as opposed to the multiplicity of circumstances  
24      that may involve checks that, for whatever reason, are not  
25      negotiated during the 90 day period?

1 MS. MANDEL: Well, it's hard to imagine  
2 negotiation -- I mean -- I'm sorry -- situation -- it -- it  
3 would appear that there are only two types of potential  
4 circumstances: One, the claimants received the check and  
5 for whatever reason never negotiated it; whether it sat on  
6 their right or had a legitimate reason where it would then  
7 -- would get into the pioneer factors for excusable neglect.

8 The second set of circumstances is they never  
9 received the check, and we believe that the provision only  
10 covers the first set of circumstances, whatever the reasons  
11 were that the checks were not negotiated after they were  
12 received.

13 THE COURT: Well, if we think -- let's just kind  
14 of think about this as a -- as a math problem.

15 The -- and I may not be even articulating the  
16 problem the right way. In how many ways is it possible for  
17 a distribution check not to be negotiated?

18 One is it's possible that there's neglect on the  
19 part of the plan administrator and its representatives in  
20 making the distribution in the first place.

21 Another is it's possible that it's lost in the  
22 mail.

23 Another is it's possible that it's lost on  
24 receipt.

25 Another is that it's possible that it's actually

1 received and the party that has received it does the same  
2 thing that happened in the case of the Staples' check. It  
3 ends up in the drawer and is forgotten.

4 It's possible that it's delivered to somebody and  
5 that somebody is supposed to negotiate the check and fails  
6 to do that.

7 And there are probably other examples as well. It  
8 could have ended up in a paper shredder by mistake.

9 MS. MANDEL: Certainly.

10 THE COURT: But the plan provision in question is  
11 open-ended to cover not only the circumstances I've  
12 identified, but presumably additional circumstances. It's  
13 partly based upon a circumstance, a failure to negotiate a  
14 payment, and it provides for what I think we can all  
15 acknowledge is a fairly tight time frame for --

16 MS. MANDEL: That's right.

17 THE COURT: -- the distribution right to be  
18 forfeited. The committee went along with that. So how does  
19 the committee today seek to argue a construction issue that  
20 is not clearly driven by the language of the plan itself?

21 MS. MANDEL: We believe, Your Honor, that we can  
22 speak to the intent behind the language that is obviously  
23 ambiguous since we are here disagreeing on what it actually  
24 means.

25 THE COURT: Okay.

1 MS. MANDEL: Thank you, Your Honor.

2 MR. HORWITZ: Your Honor, Maurice Horwitz, Weil,  
3 Gotshal & Manges on behalf of the plan administrator.

4 Your Honor, I'm going to start by quoting Garrett  
5 Feil (ph) who was unable to attend today, but he started out  
6 the hearing -- the last hearing that we had on this matter  
7 by saying that this is an unfortunate situation. I don't  
8 know any other way to describe it, even for the plan  
9 administrator, who is sympathetic to Traxis's position.

10 Your Honor, the plan administrator's primary  
11 purpose, it's reason for being, really, is to carry out all  
12 of the provisions of the plan and, among those provisions,  
13 is Section 6.8(b)(2) which is to make distributions to  
14 holders of allowed claims, such as and including Traxis.  
15 And there is no question that the claims that are at issue  
16 today were and are allowed claims.

17 But the plan administrator can only make  
18 distributions in accordance with the plan. And in the  
19 present circumstances, Your Honor, the plan administrator  
20 faces really two problems with that and with the facts  
21 alleged by Traxis in their -- in their motion papers, their  
22 reply, and the supporting affidavits.

23 The first is what we were just talking about, the  
24 plain language of Section 8.9. The plan administrator does  
25 not see that provision as giving it any discretion. In

1 fact, if you read the provision, the plan administrator  
2 isn't even mentioned. It's not a subject of any action in  
3 that provision: "The voided check shall irrevocably revert  
4 to the debtor and any claim in respect of such voided check  
5 shall be discharged and forever" --

6 THE COURT: So --

7 MR. HORWITZ: -- "barred."

8 THE COURT: So can I cut through this and give you  
9 cover? Let's just say that the reason that we're having  
10 this contest over what you correctly describe as an  
11 unfortunate situation involves strict construction of a plan  
12 provision that I think we can all acknowledge represents a  
13 boiler plate provision and does not, within its language,  
14 say that it can be waived in the discretion of the plan  
15 administrator.

16 But let's just say that we're doing this in order  
17 to be purists in strictly applying language of the plan.  
18 Would you agree that I have the authority with my pen to  
19 simply override that in this case on any number of grounds,  
20 including a finding of plain near like excusable neglect?

21 MR. HORWITZ: I would agree that the Court does  
22 have that authority to do so.

23 THE COURT: In that case, that's what I'm doing,  
24 and I'm going to grant the Traxis motion with the  
25 understanding that everybody recognizes this as an

1       unfortunate situation; that it is demonstrably inequitable  
2       for Traxis not to be given replacement checks for the four  
3       checks that were unaccountably lost from the initial  
4       distribution; and that I'm doing this on the basis of the  
5       excusable neglect argument, which is the alternative  
6       argument made by Traxis and the argument which is adopted by  
7       the committee in paragraph 4 of the committee's statement.

8               In doing so, I am not in any way altering the  
9       provisions of the plan itself, nor am I interpreting Section  
10      8.9 of the plan, which speaks for itself and which may be  
11      strictly applied in other situations. Accordingly, there is  
12      no flood gates risk here as far as I'm concerned.

13             And that's my ruling.

14             MR. HORWITZ: Thank you, Your Honor.

15             MR. ASHMEAD: Thank you, Your Honor. We will --

16             MR. O'DONNELL: Thank you, Your Honor.

17             THE COURT: -- speak with plan administrator  
18      counsel to submit an order to the Court.

19             THE COURT: That's -- that's fine.

20             MR. ASHMEAD: Thank you, Your Honor.

21             THE COURT: I heard somebody on the phone.

22             MR. ASHMEAD: I think that Mr. O'Donnell saying --

23             THE COURT: Mr. O'Donnell, what are you saying?

24             What is anybody else saying?

25             Hearing nothing further, we're adjourned.



1 Thank you.

2 MS. MANDEL: Thank you.

3 MR. HORWITZ: Thank you.

4 (Whereupon, proceedings were concluded at 10:43 a.m.)

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C E R T I F I C A T I O N

I, Sherri L. Breach, CERT\*D-397, certified that the foregoing transcript is a true and accurate record of the proceedings.

SHERRI L. BREACH

AAERT Certified Electronic Reporter & Transcriber

CERT\*D -397

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Date: March 4, 2013